Supreme Court, U.S. (1)

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

CHARLES R. BUCHEK,

Petitioner,

vs.

MONSANTO COMPANY, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Steven M. Davis
Counsel of Record
Davis & Appelbaum, P.C.
4139 Jeffco Blvd.
Arnold, MO. 63010
(314)464-8330
Counsel for Petitioner

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Questions Presented

1. In an age discrimination and race discrimination case, does evidence of a Plaintiff's performance record as compared to those receiving preferential treatment, evidence of the exclusion of Plaintiff as a candidate for other available positions, and an internal memo stating an intention to mandate racial quotas constitute direct evidence giving rise to a genuine issue regarding whether defendant's actions were motivated by discriminatory animus?

2. In an age discrimination and race discrimination case, does evidence of a company's existing Affirmative Action Plan, along with an internal memo mandating racial quotas, satisfy the requirement of "some additional showing" that unlawful discrimination was a factor in an employment decision, established in McDonnell Douglas Corp. vs. Green, 411 U.S. 792, 802 (1973)?

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42 U.S.C. 2000 et seq

28 U.S.C. 1343

In the
Supreme Court of the United States

No.

CHARLES R. BUCHEK,

Petitioner,

v.

MONSANTO COMPANY, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Charles R. Buchek respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on August 14, 1998.

Opinions Below

The opinion of the Court of Appeals below (Appendix A, infra, pp A-1 to A-2) was not reported. The order of the District Court below (Appendix B, B-1 to B-13) was not reported.

Jurisdiction

The judgment of the Court below (Appendix A, pp A-1 to A-2) was entered on August 14, 1998. Rehearing was requested on August 28, 1998. (Appendix C pp C-1 to C-6). Rehearing was denied on September 14, 1998. (Appendix D) The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Statutory Provisions Involved

29 U.S.C. 621 et seq

28 U.S.C. 1343

42 U.S.C. 1981 et seq

42 U.S.C. 2000 et seq

STATEMENT OF THE CASE

Charles R. Buchek began his career with Monsanto as a transportation analyst in 1972. By 1984 Buchek had advanced to senior transportation analyst, and later promoted to supervisor of international transportation services, as well as various other management positions within the company.

During the course of his employment with Monsanto, Buchek received several achievement awards and was rated "outstanding" or "high" in all areas, while never having been subject to any disciplinary actions.

In 1993, selected departments within the company began a "reorganization" effort, including the transportation, procurement and distribution department, in which Buchek was employed. During that time Buchek turned 48 years of age on November 22, 1993.

As a result of the "reorganization" effort, Buchek was demoted two grade levels in December, 1993 despite the fact that

Buchek had the best cost improvement performance of any employee within his department, and had received annual "high" or "outstanding" ratings.

On or about February, 1993, an African-American with far less experience and far less competence was promoted over Buchek, who had a better work record as evidenced by annual performance records. In fact, the promoted individual had previously made serious mistakes resulting in great financial cost to the company, including double contracting with two separate carriers putting the company at risk of losing $750,000.

When Buchek questioned the decisions being made in this regard, he was harassed, demoted and subsequently terminated. Further, Buchek was denied the opportunity to be interviewed for or considered for numerous job opportunities within the company, despite his vast experience and level of competence.

In September, 1993, Monsanto officials created an internal panel to provide a rating of candidates for positions being filled in the alleged "reorganization". One of the positions was already

filled by Buchek. This panel was not permitted to see performance evaluations of the candidates, or personnel files, nor interview the candidates. Of the eight candidates given positions pursuant to this effort, two were African-American, four were younger than Buchek, and four were not even rated by the panel. Further, there was evidence that ratings were altered in an effort to lower the scores of Buchek. After the positions were given, the panel, which had never been used before, was never used again.

The aforementioned plan and actions were predicated upon the company's self-styled affirmative action plan which was implemented with no evidence of any manifest injustice to members of any protected class, and which directed that "women and minorities are not penalized for performance deficiencies ..."

The company's intent was further evidenced by a confidential internal memo prepared by M.E. Miller, a Vice-President, wherein he mandated that the process of hiring and promotion be changed in order to meet racial quotas.

As a result of the practices of the company, Buchek was

ridiculed, harassed, demoted, and forcibly retired all of which caused great harm.

Existence of Jurisdiction Below

On March 13, 1996, Buchek filed a compiaint in the United States District Court for the Eastern District of Missouri, Eastern Division, alleging two counts of age discrimination and four counts of race discrimination. Thereafter, Monsanto filed a Motion for Summary Judgment, and on March 21, 1997, the District Court granted Summary Judgment in favor of Monsanto, ruling that Buchek failed to show direct evidence giving rise to a genuine issue regarding whether Monsanto's actions were motivated by discriminatory animus. The Court also ruled that Buchek failed to provide any additional showing that age or race was a factor in the employment decision.

Buchek filed his Appeal to the United States Court of Appeals for the Eighth Circuit. That Court affirmed the District Court ruling on August 14, 1998, and Buchek's Motion for rehearing en banc was denied on September 14, 1998.

Reasons for Granting the Writ

The Court of Appeals erred in affirming the District Court's grant of Summary Judgment in favor of Monsanto, and it's opinion is inconsistent with it's own opinion in Kempcke vs. Monsanto (United States Court of Appeals - Eight Circuit, No. 97-1423 decided January 6, 1998.)

Pursuant to Federal Rule of Civil Procedure 56(c), a Court may grant a Motion for Summary Judgment if all of the information before the Court shows "there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

To withstand a Motion for Summary Judgment in a Title VII case a Plaintiff must establish that there is a genuine issue of material fact, under one of two theories: That there is direct evidence giving rise to a genuine issue regarding whether defendant's actions were motivated by discriminatory animus; or that there is indirect evidence of discrimination through the use of

the three-part test established in McDonnell Douglas Corp. vs. Green, 411 U.S. 792, 802 (1973).

In the instant case, Buchek submitted to the Court direct evidence giving rise to a genuine issue regarding whether defendant's actions were motivated by discriminatory animus. This evidence included Buchek's performance record as compared to Tyrone Griffin, the African-American who was promoted over Buchek, and the other "successful" candidates who were either minority or younger than Buchek, and the systematic exclusion of Buchek for opportunities within the company due to his race and age. It also included the memo drafted by M.E. Miller, evidencing Monsanto's intent to mandate racial quotas. This evidence created a genuine issue which Buchek was entitled to present at trial.

The District Court analyzed this case under the "prima facia" theory. The Court found that defendant did not challenge Buchek's ability to meet the first three requirements of that test, however, ruled that he failed to provide any additional showing

that age or race was a factor in the employment decision. All that is required is that plaintiff provide "some additional showing" that unlawful discrimination was a factor" Nitschke v. McDonnell Douglas Corporation, 68 F. 3rd 249, 251 (8th Circuit 1995). By refusing to consider the direct evidence and additional showing submitted by Buchek, the District Court abused it's discretion.

On Appeal to the United States Court of Appeals for the Eighth Circuit, the record was expanded to include Monsanto's Affirmative Action Plan, implemented in 1992, and the precursor of the memo drafted by M.E. Miller. Taken together, these documents present clear evidence of an intent to instill racial quotas when no manifest injustice had been shown to exist and they were under no Court-ordered mandates. Thus, the Court of Appeals abused it's discretion in affirming the District Court's ruling.

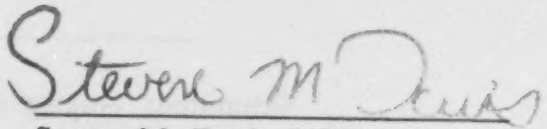
"Summary Judgments should be used sparingly and only when in those rare instances where there is no dispute of fact and where there exists only one conclusion." Johnson v. Minnesota Historical Society, 931 F.2nd 1239, 1244 (8th Cir. 1991).

The instant case presents the United States Supreme Court with the opportunity to address and clarify the numerous "preference" and "affirmative action" cases involving the private sector. Monsanto implemented their "plan" with no court decision demonstrating that it had a manifest imbalance. The manner in which these preferences were applied egregiously and insidiously excluded caucasian males, and rendered the opportunities and "achievements of minorities as frivolous. Monsanto's deeply entrenched patterns of discrimination have been shown in at least two cases in the Eighth Circuit. This practice suggests that minorities are inferior and unable to compete on their own merit, and places our nation at a disadvantage as we seek to compete in a global economy in the next millennium.

Conclusion

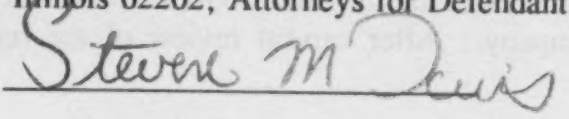
This Court should review this case because of the District Court's failure to consider the evidence submitted by Plaintiff-Appellant, and because the opinion of the Court of Appeals is inconsistent with other holdings.

Respectfully submitted,



Steven M. Davis #177187
Attorney for Appellant
4139 Jeffco Blvd.
Arnold, MO. 63010
(314)464-8330

I hereby certify that a copy of the foregoing was mailed, postage prepaid, this 8 day of December, 1998 to: Gregory M. Garger and Margaret R. Gibbs, Winston & Strawn, 35 West Wacker Drive, Chicago, Illinois 60601, and to William H. Hoagland and Robert Raleigh, Hoagland, Fitzgerald, Smith & Pranaitis, 401 Market Street, Alton, Illinois 62202, Attorneys for Defendant.



Appendix A

United States Court of Appeals
for the eighth circuit

No. 97-2150EM
No. 98-1007EM

Charles R. Buchek, Appellant,	)
	) Appeal for the United States
	) District Court for the Eastern
vs.	) District of Missouri
	)
Monsanto Company, Appellee.	) (UNPUBLISHED)
	)

Submitted: August 7, 1998 -
Filed: August 14, 1998 -

Before FAGG, BEAM, and LOKEN, Circuit Judges.

PER CURIAM.

Charles R. Buchek appeals the district court's adverse grant of summary judgment in Buchek's employment discrimination action and the district court's award of costs to Monsanto Company. After careful review of the record and the parties'

briefs, we conclude the district court correctly granted judgment in favor of Monsanto Company. We also conclude the district court's decision to award costs was not an abuse of discretion. See Bathke v. Casey's Gen. Stores, Inc., 64 F.3d 340, 347 (8th Cir. 1995) (standard of review). We deny the parties' motions on appeal. We thus affirm the district court. See 8th Cir. R. 47B.

A true copy.

Attest:
CLERK, U.S. COURT OF APPEALS, EIGHT CIRCUIT.

Appendix B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

CHARLES R. BUCHEK,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 4:96CV00513 ERW
	)	
MONSANTO COMPANY,	)	
	)	
Defendant.	)	

MEMORANDUM AND ORDER

This matter is before the Court on the defendant's motion for summary judgment (document #32).

Plaintiff Charles R. Buchek brought this action against defendant Monsanto Company, alleging age discrimination in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. S 621 (Count I), age discrimination in violation of the Missouri Human Rights Act (MHRA), Mo. Rev. Stat. S 213.010 (Count II), and race discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. S2000e et seq. (Title VII) and the MHRA (Counts III and IV). Plaintiff is a white male who

alleges reverse race discrimination.

I. Factual Background

Charles Buchek began working for defendant in 1972. He worked for defendant in areas that control distribution of chemicals and materials used by defendant for manufacturing its products. In 1993, at forty-seven years old, plaintiff worked in the Distribution Services Department as one of seven contract administrators. In 1993, defendant began restructuring and employees were offered a chance to participate in a voluntary separation program. The program was designated to coax employees into early retirement to compliment defendant's downsizing. Defendant was implementing a reduction in force, and plaintiff's department, the Distribution Services Department, was restructured under the direction of it's director, Gary Page. When the department was restructured, the number of contract administrator positions went from seven to six.

As part of the restructuring, defendant informed employees that no one in the old department was guaranteed a position in the

new department. All the jobs were "up for grabs", and employees had to compete for the available positions. The competition included members of the department and other employees who were qualified or interested in the positions. Plaintiff alleges defendant's illegal discrimination kept him from getting one of three positions filled during the restructuring, which included: contract administrator, distribution equipment specialist, and compliance training specialist.

Page developed a system to evaluate and compare the abilities of the candidates. The five competencies were used to evaluate each candidate included: communication effectiveness, team/leadership skills, technical/functional expertise, planning and organizing, and innovation and adaptability. Race and ages were not among the criteria used in the evaluation process.

Page assembled a panel of evaluators to rank the candidates for each job. Nine of the ten evaluators were Caucasian, and all were over 40 years old. The scores from the evaluators were averaged and the candidates were ranked in order from the highest

to the lowest average score. Page offered jobs first to the highest ranked candidates, and each of the positions had more candidates than available positions. Each position's candidates were evaluated separately, and plaintiff was ranked the lowest of all candidates for each of the three positions. Plaintiff was eventually offered and accepted a job as a pricing services specialist, which had an employee grade level lower than his previous position.

II. Discussion

The standards applicable to summary judgment motions are well settled. Pursuant to Federal Rule of Civil Procedure 56(c), a court may grant a motion for summary judgment if all of the information before the court shows "there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

The moving party has the initial burden of clearly establishing the non-existence of any genuine issue of fact that is material to a judgment in its favor. City of Mt. Pleasant, Iowa

v. Associated Elec. Co-op., Inc., 838 F.2d 268, 273 (8th Cir. 1988). Once this burden is discharged, if the record does in fact bear out that no genuine dispute exists, the burden then shifts to the non-moving party who must set forth affirmative evidence and specific facts showing there is a genuine dispute on that issue. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986).

Once the burden shifts, the non-moving party may not rest on the allegations in his pleadings, but by affidavit or other evidence must set forth specific facts showing that a genuine issue of material fact exists. **Fed. R. Civ. P. 56(e)**. The non-moving party "must doe more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). In fact, the non-moving party must show there is sufficient evidence favoring the non-moving party which would enable a jury to return a verdict for him. Anderson, 477 U.S. at 249; Celotex, 477 U.S. at 324.

In support of the motions for summary judgment, movants

have filed numerous affidavits and exhibits. This Court is required to view the facts set forth in these documents in a light most favorable to the non-moving party, and must give the non-moving party the benefit of any inferences that can logically be drawn from those facts. Matsushita, 475 U.S. at 587; Buller v. Buechler, 706 F.2d 844, 846 (8th Cir. 1983). Moreover, this Court is required to resolve all conflicts in favor of the non-moving party. Robert Johnson Grain Co. v. Chemical Interchange Co., 541 F.2d 207, 210 (8th Cir. 1976). However, if the non-moving party bears the burden of proof at trial, summary judgment is warranted if the non-movant is unable to make a showing sufficient to establish the existence of an element essential to its case. Lujan v. National Wildlife Federation, 497 U.S. 871, 884 (1990).

A. Discrimination Standard

To withstand a motion for summary judgment in a Title VII case a plaintiff must establish that there is a genuine issue of material fact, under one of two theories. Plaintiff must either show that there is direct evidence giving rise to a genuine issue

regarding whether defendant's actions were motivated by discriminatory animus, **Price Waterhouse v. Hopkins**, 490 U.S. 228 (2989) (the so called mixed-motive analysis), or plaintiff must show indirect evidence of discrimination through the use of the three-part test established in **McDonnell Douglas Corp. v. Green**, 411 U.S. 792, 802 (1973). Plaintiff argues the evidence in terms of the mixed-motive analysis, and defendant argues the McDonnell Douglas test.

"Employment discrimination law recognizes an important distinction between mixed-motive and pretext cases." **Fuller v. Phipps**, 67 F.3d 1137, 1141 (4th Cir. 1995). The distinction is crucial because the standards applicable in a mixed-motive case are much more favorable to the plaintiff. **Id.** When an employee produces direct evidence that an illegitimate criterion, such as gender, played a motivating part in an adverse employment decision, the case is analyzed under the standards of liability applicable to mixed-motive cases. **Id.** at 1141. In the absence of direct evidence of discrimination, courts apply the three-part

McDonnell Douglas test. Plaintiff has failed to produce evidence that directly reflects the use of an illegitimate criterion in the employment selection decisions, so the mixed-motive analysis is inappropriate.

B. Discrimination Claims

The Court will analyze plaintiffs discrimination claims under the burden shifting analysis of McDonnell Douglas because there is no direct evidence of discriminatory intent. See Holley v. Sanyo Mfg., Inc., 771 F.2d 1161, 1166 (8th Cir. 1985). in an employment discrimination case under Title VII, the ADEA, or MHRA, summary judgment is appropriate unless plaintiff has competent evidence supporting each of the elements of her prima facie case.[1] Hutson v. McDonnell Douglas, 63 F.3d 771, 776 (8th Cir. 1995). If the prima facie case has been established, the

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[1] Although McDonnell Douglas was a Title VII action, its burden-shifting framework also applies to ADEA and MHRA cases. Krenik v. County of Le Sueur, 47 F.3d 953, 957 (8th Cir. 1995); Gaworski v. ITT Commercial Finance Corp., 17 F.3d 1104, 1108 n.3 (8th Cir.) cert. denied, 115 S. Ct. 355 (1994); Rinehart v. City of Independence, Mo., 35 F.3d 1263, 1265 n.1 (8th Cir. 1994) cert. denied, 115 S. Ct. 1822 (1995).

employer has the burden of producing evidence that it discharged the plaintiff for a legitimate, nondiscriminatory reason, and the burden of production then shifts to the plaintiff to prove that the reason provided by the employer was a pretext for discrimination. Nitschke v. McDonnell Douglas Corp., 68 F.3d 249, 251 (8th Cir. 1995). The ultimate burden of proving discriminatory intent remains on the plaintiff at all times. Rothmeier v. Investment Advisers, Inc., 85 F.3d 1328, 1332 (8th Cir. 1996). At the summary judgment state the plaintiff must do more at the pretext stage then merely discredit defendants reason; it must present sufficient evidence upon which a jury could infer that the employer's reason was false, and that discrimination was the real reason. St. Marys Honor Center v. Hicks, 509 U.S. 502, 515-16 (1993).

The elements of a prima facie case are: (1) that plaintiff is within a protected group; (2) he was qualified for his position; (3) that plaintiff was emoted from that position and did not receive

other positions he was interested in; and (4) he must also provide some additional showing that (race or age) was a factor in the termination." Hutson, 63 F.3d at 776.

Although defendant does not challenge plaintiff's ability to meet the first three requirements, it contends that plaintiff failed to provide any additional showing that age or race was a factor in the employment decision, an added requirement in a reduction-in-force (RIF) case.

The Eighth Circuit has repeatedly held that in order to establish a prima facie case, a plaintiff who was dismissed pursuant to a RIF must, in addition to the ordinary requirements of the prima facie case, "provide some 'additional showing' that (unlawful discrimination) was a factor" in the demotion. Nitschke v. McDonnell Douglas Corporation, 68 F.3d 249, 251 (8th Cir. 1995), quoting Hutson v. McDonnell Douglas Corporation, 63 F.3d 771, 776 (8th Cir. 1995). The fourth element can be established by direct evidence. statistical evidence of circumstantial evidence. Holley, 771 F. 2d at 1166. Defendant contends that

plaintiff fails to offer any evidence which might satisfy this element by raising an inference that race or age was a motivating factor in plaintiff not being selected for the positions. The Court agrees. Plaintiff offers no evidence, other than his own opinions, raising any inference that race or age was a motivating factor.

Plaintiff alleges that there was never a reduction in force, and that after the restructuring, there were actually more employees in the department. Plaintiff submits two documents purporting to show the total number of employees in the department in 1992 and 1993. However, plaintiff's explanation of the documents is without support or other contradiction of the affidavits and testimony to the contrary. In addition, in his own documents and deposition plaintiff concedes that the company underwent a restructuring and refers to it as a downsizing. The court finds that the fourth element is required in this case and that plaintiff has failed to produce any facts or evidence to satisfy his burden of the additional showing that race or age was a factor in his demotion.

Even if the plan put in place by defendant wasn't a RIF,

which this Court finds that it was, defendant could satisfy any subsequent burden by producing evidence that plaintiff's demotion was for legitimate, non-discriminatory reasons. Consequently, even it plaintiff would have satisfied the "additional showing" requirement of the prima facie case in this context, the ultimate burden is also his to prove that defendant's proffered non-discriminatory reasons are a pretext for discrimination. Nitschke, 68 F. 3d at 251. Both aspects of plaintiff's burden, then, require an examination of the sufficiency of plaintiff's proof of age or race-based discrimination.

Defendant produced evidence that the decisions were made for legitimate non-discriminatory reasons. Plaintiff ranked last in the evaluations for each position that was filled. The ranking would not have been filled by the employees plaintiff challenges, other candidates who ranked higher, than plaintiff would have received the slots before plaintiff.

Plaintiff offers testimony from non-decision makers attempting to point out his ability to competently perform his job,

but this evidence does not discredit defendant's explanation. "Mere submission of materials from a co-worker or supervisor indicating that an employee's performance is satisfactory...does not create a material issue of fact." **Anderson v. Baxter Healthcare Corp.**, 13 F. 3d 1120, 1125 (7th Cir. 1994).

Even if the Court assumes, for the purpose of this motion, that plaintiff can establish a prima facie case of discrimination, defendant can then proffer a legitimate, nondiscriminatory reasons for the demotion. This evidence, which is undisputed, shows that plaintiff was demoted and not chosen for legitimate, nondiscriminatory reasons. **See Nitschke**, 68 F.3d at 251.

The Court must now turn to whether defendant's proffered reason is merely a pretext for discrimination. The Court finds that plaintiff has failed to put forward any facts giving rise to any genuine factual disputes with regard to whether that intentional discrimination was the real reason defendant demoted plaintiff. **See St. Mary's Honor Center**, 509 U.S. at 515.

"(E)mployment discrimination laws have not vested in the

federal courts the authority to sit as super-personnel departments reviewing the wisdom or fairness of the business judgments made by employers, except to the extent that those judgments involve intentional discrimination." Hutson v. McDonnell Douglas Corp., 63 F.3d 771, 781 (8th Cir. 1995).

In response to defendant's motion for summary judgment, plaintiff does not offer any evidence supporting his age discrimination, pattern and practice, or disparate impact claims. These claims must be dismissed because there is no genuine issue of material fact. Plaintiff only submits evidence in an attempt to support his reverse race discrimination disparate treatment claim, and as stated above, the evidence does not support his claim. Plaintiff has failed to produce evidence showing genuine disputes of material fact, and therefore defendant is entitled to judgment as a matter of law on plaintiff's discrimination claims. Finally, plaintiff attempts for the first time to raise a claim of racial harassment in his response to defendant's motion for summary judgment. The court will not discuss the merits of this issue

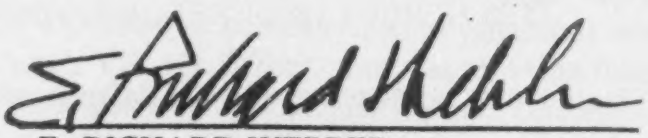
because plaintiff's claim does not exist in this lawsuit and cannot be added in the manner plaintiff chose.

Accordingly,

IT IS HEREBY ORDERED that defendant's motion for summary judgment (document #32) is GRANTED.

An appropriate Judgment will accompany this Memorandum and Order.

Dated this 21st day of March, 1997.



E. RICHARD WEBBER
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

CHARLES R. BUCHEK,	)	
	)	
Plaintiff,	)	
	)	No. 4:96CV00513 ERW
vs.	)	
	)	
MONSANTO COMPANY,	)	
	)	
Defendant.	)	

JUDGMENT

IT IS HEREBY ORDERED, ADJUDGED and DECREED that judgment is entered in favor of defendant Monsanto Company and against Plaintiff Charles R. Buchek on all counts.

Dated this 21st Day of March, 1997.

E. RICHARD WEBBER
UNITED STATES DISTRICT JUDGE

Appendix C

Petition for Rehearing with Suggestion for Rehearing En Banc

UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT

Charles R. Buchek,	)
Plaintiff-Appellant	) District Ct NO 4:96-CV-513(ERW)
	)
vs.	)
	)Appeals Court No. 97-2150EMSL
Monsanto Company, Inc.	)that has been consolidated
Defendant-Appellee	)with Case No. 98-1007 EMSL

This Case essentially involves a protected age group Caucasian male who was an outstanding Purchasing Manager for Monsanto since 1984 and had been with the company for 25 years. On or about March 16, 1994, a company memo (attached) was issued by the company's VP, Mr. Miller, who was also Chairman of the Company's Affirmative Action/Diversity Plan. This memo mandated to increase minority (People of color), participation. The company was not under a court decree or consent judgment and had no manifest imbalance, or other evidence of lingering or systemic discrimination. To the contrary, Monsanto was aggressively mandating 16% for representation in the company-wide workforce for People of Color in management positions. This goal is more than double the availability of Blacks in the St. Louis Metropolitan Area.

On or about February, 1993 an incompetent Afro-American was promoted for the second time in approximately two years over Buchek & others who had far more experience and better work record as evidenced by annual performance records. What made this matter even more egregious was that the Afro-American manager had previously contracted for approximately $7650,000 with two railroads to ship the identical, same merchandise. He also had recently displayed numerous other inept, similar managerial errors. When Buchek objected to the incompetence he

displayed in the area Buchek managed, Buchek was harassed, demoted, retaliated against and subsequently discharged. To add "insult to injury" there were numerous job opportunities which Mr. Buchek applied for, and was not even interviewed or considered for even though he had far more experience and was the top producer (purchasing responsible delivery services at the lowest possible cost). Additionally year after year he was rated very high in all other areas of performance.

In September, 1993, Monsanto officials created an internal panel to provide a rating of candidates for positions that were being filled in an alleged reorganization in Mr. Page's department. The positions were six contract administrators (transportation buyers) one Regulatory Compliance Training Specialist, and one Distribution Equipment position already filled by Mr. Buchek. The firm required Mr. Buchek to compete for his own position with candidates who either had no transportation procurement experience or with candidates with lower performance evaluations than Mr. Buchek as noted above.

In rating the candidates, the panelists were not permitted to see performance evaluations of the candidates; were not permitted to review personnel files; and, were not permitted to interview candidates to assess their knowledge and capabilities. The panelists were also required to rate candidates without any personal knowledge of their work performance.

Among the eight candidates who were given positions by the firm in 1993, two were Black, four were younger than Mr. Buchek, and 4 persons were not even rated by the panel.

The failure to submit some candidates for panel ratings is clear evidence that the panel ratings were a subterfuge to segregate Mr. Buchek on the basis of his race and age, and to remove him from his contract administrator position.

In addition, some of the rating sheets were visibly altered. one panelist sheet showed that Mr. Buchek's rating were lowered in four of five rating categories. Mr. Bucheck's ratings had more alterations than any other candidate did by a wide margin. The firm conceivably deliberately altered the scores of Mr. Buchek in

order to curtail or eliminate his employment opportunities.

After the use of the ratings, Mr. Buchek was excluded from the selection process, and two younger candidates (one much younger, age approximately 29, and an Afro-American) were selected during that time frame. This panel was never used before or since at Monsanto. The sole purpose of this panel was to exclude Mr. Buchek from the position.

After Mr. Buchek protested the firm's actions, the firm first attempted to terminate Mr. Buchek, and when met with opposition demoted Mr. Buchek to a position two grade levels lower (pricing services group - a different section of the same department) that was known to be targeted for elimination.

One of the six persons selected in the department was a much younger Black supervisor who benefited from racial preferences that were clearly in the firm's 1993 Affirmative Action Plan. The Plan states that minorities should be mentored to improve their chances for promotion, and that their performance deficiencies should be disregarded. It also states that managers would be financially rewarded consistent with the results achieved in implementing this Affirmative Action/Diversity Plan.

The company-wide Monsanto preferences for Blacks is also evidenced by a 26% reduction in the number of White Managers and Officials compared to only a 12% reduction in the number of Black Managers and Officials from 1992 to 1996. 907 White Managers and Officials lost their jobs, while only 23 Black Managers and Officials lost their employment from 1992 to 1996. See EEO-1 reports attached. This indicates that the chances of a White Manager or Official for termination of employment were more than 2 to 1 compared to that of a Black Manager or Official.

Mr. Buchek filed a charge with the EEOC in June 1994 and filed his first lawsuit against Monsanto in March 1996. Due to the treatment he received after filing the charge and the lawsuit and to avoid lapsing of the 300 day period for filing charges, Mr. Buchek filed a second EEOC charge in June 1996, alleging Race, Age, Disability discrimination, and Retaliation.

Shortly after filing the charge in June 1996, Mr. Buchek

was, without any prior notice on or about October 21, 1996 ordered to leave the premises, and not to return. He was escorted by a security guard, and treated like a common criminal - this type of treatment is a very rare occurrence at Monsanto. Mr. Buchek was not allowed the time to pack up all personal belongings in his work area. The first promised to forward items later, but did not do so. Security personnel abruptly began to randomly throw things in boxes. At the same time, Mr. Buchek did not realize that Monsanto personnel had also tossed a sealed early retirement offer in the boxes. in fact, at the time of his eviction, Mr. Buchek did not realize he had even received a sealed early retirement offer. it was not until several days later that both Mr. Buchek and his wife discovered at the same time the sealed early retirement offer in these boxes, which were essentially packed by Monsanto personnel.

After his eviction, Mr. Buchek had contact with the appropriate, personnel designated as his interface with Monsanto (Ms. Shirley Dintelman et al.) that included several phone calls, and a written request to ascertain him employment status. He eventually was informed that he would be terminated effective December 31, 1996 (see attached), unless he accepted an early retirement package, which included a separate mediation offer.

He was advised that four other employees in his department were terminated due to the elimination of their positions. Of the five employees in this department (not including one contract person who was retained), 3 retired with full pension (full pension benefits were only available if you were age 55 or over) plus additional retirement incentives. Mr. Buchek was the only employee in the department who was under age 55, was terminated, and forced to accept reduced early retirement benefits. Another employee, under age 55, (Thomas R. Willmering, age 53 during 12/96 alleged restructuring - birth-date 5/2/43 was retained). However, Mr. Buchek was forced to either accept the package or be terminated even though he was trained in and had performed in Mr. Willmering's function, and had a far better record overall. Therefore, Mr. Buchek was the only one under the

age of 55 in 1996 to be involuntarily retired with reduced early retirement benefits without health insurance, and evicted from the Campus without any stated reason, in this section of the department. Two others were retained; namely one contract person - Harold Pyatt, and one employee - Thomas R. Willmering. Of the four employees separated, one is back at Monsanto handling the former section's work on a part-time basis (Frank Hill), and the other (Ed Est) was quickly hired by firm to whom the work was outsourced (Cass Logistics Co) to handle some of the increased workload. Monsanto has recently admitted that there may not be a net savings and possibly could be suffering a net loss due to the termination/retirement of these 4 employees/positions in this section of the department.

Evidence has also been obtained from a case of Kempcke v. Monsanto (Case no. 97-1423, 8th Cir.1998) that the firm developed a "hit list" of older white male managers to be terminated by the firm over a two to three year period. This age animus was a deeply entrenched, company-wide pattern at Monsanto.

Mr. Buchek observed inappropriate preferences given to Blacks, and unlike most of his White male colleagues, he attempted to change the conditions of employment at Monsanto for himself and other White males in the management of the firm. When he questioned the firm's policies and practices of granting unwarranted preferences to Blacks and other minorities, Mr. Buchek was ridiculed, harassed, demoted, and forcibly retired. He was, in effect, ostracized, segregated, and retaliated against for his protests of illegal preferences.

CONCLUSION

Mr. Buchek strongly believes that the premature dismissal of his case by the District Court and the three Judge Appellate decision(s) sets bad precedent. he further believes this will encourage this employer, and many other private employers, to initiate or continue frolics on their own with inappropriate preferences for minorities, and will create a chilling effect for persons who protest unfair policies or practices believed to be

illegal discrimination.

It is Mr. Buchek's opinion that the Supreme Court is seeking a solid preference case involving a private employer in an effort to clarify the salient principles set forth in the Adarand, Hopwood, Taxman, and other recent decisions. Mr. Buchek also firmly believes that Monsanto's 1993 Affirmative Action Plan should as a matter of law be subject to "Strict Scrutiny", and that their Plan would resoundingly fail such a test.

The preferential treatment of Blacks as evidenced in the firm's Official 1993 Affirmation action Plan; the alteration of records; the employer's fraudulent representation that there was a Reduction in Force in Buchek's Department; and the subterfuge of a rating panel that did not even rate all of the selection candidates merit a full hearing of the case.

This case involves egregious preferences that lower standards in the United States at a time when we must complete in a global market. Unwarranted and inappropriate preferences insult the merit of minority individuals, and is pervasive discrimination against Caucasians. Hence Caucasians and Blacks are both insulted, standards are lowered; and, employers are producing inferior products and services to consumers both in the United States and globally.

Mr. Buchek is deeply concerned, and also very troubled by the inconsistency in the two judges in his case as compared to the same two judges involved in the Kempcke decision.

Mr. Buchek does not seek better treatment by his employer or this court than other persons of a different race, sex, or age. He only wants to be treated equally as referred to in the Declaration of Independence, the Constitution, Title VII of the Civil Rights Act, and the Age Discrimination in Employment Act.

Mr. Buchek has represented himself Pro Se in this Appellate proceeding, but has retained an Attorney to represent him in the second case. His Attorney would also appreciate the opportunity to combine the two cases at the District Court level. Mr. Buchek is also currently moving aggressively to obtain representation by a group of Attorneys. if an En Banc Hearing is

granted, or if the case should be heard by the Supreme Court, Mr. Buchek will have appropriate legal representation.

Mr. Buchek also requests that the taxation of costs be stayed and remanded to the District Court of the grounds of misconduct of Appellee, which includes alteration of records, improper goals and quotas for hiring, retaining, and promoted People of Color (Afro), and the use of an "Upgrade Plan" to demote or terminate persons over 40 years of age. In addition, the cost of Mr. Bucheck's deposition, 86% of which was not presented or considered by the District Court was excessive.

Mr. Buchek requests a fair hearing by the District Court of all aspects of his employment with Monsanto. Mr. Buchek is requesting that this case be remanded to the District Court because there are still many material facts in dispute. It would be helpful to the District Court to have all the facts of Mr. Buchek's employment in order to render a proper decision in the second case - July 17, 1997 - Case No. 497CV1498CEJ.

Respectively submitted

Charles R Buchek 8/28/98

Charles R. Buchek, pro se Date
16313 Centerpointe Drive
Grover, MO. 63040-1602
(314)458-4222

CERTIFICATE OF SERVICE

A copy of the foregoing was mailed postage prepaid, this day, August 28, 1998 to Margaret R. Gibbs, Joan Fife, Gregory Garger, et. al., Winston & Strawn, 35 West Wacker Drive, Chicago, Illinois 60601, and to William H. Hoagland and Robert Raleigh, Fitzgerald, Smith & Pranatis, 401 Market Street, Alton, Illinois 62202.

Charles R Buchek 8/28/98

Signature Date

Appendix D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 97-215OEMSL

Charles R. Buchek,	)
	)
Appellant,	)
	)
vs.	) Order Denying Petition for
	) Rehearing and Suggestion
Monsanto Company,	) for Rehearing En Banc
	)
Appellee.	)

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied. Judge Beam would grant Buchek's petition for panel rehearing.

September 14, 1998

Order Entered at the Direction of the Court:

Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit